SUPREME COURT. U. S.

FILED
FEB 6 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 720

COWLITZ TRIBE OF INDIANS, *Petitioner*,

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

MARSHALL McCORMICK
ROBERT R. HAMILTON
PAUL J. NOLAN
304 City Hall
Tacoma 2, Washington
Attorneys for Respondent

LORINGER I. LANGLOW, PRINTER, TACOMA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 720

COWLITZ TRIBE OF INDIANS, *Petitioner*,

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

MARSHALL MCCORMICK
ROBERT R. HAMILTON
PAUL J. NOLAN
304 City Hall
Tacoma 2, Washington
Attorneys for Respondent

LORIMER I. LANGLOW, PRINTER, TACOMA

INDEX

	Page
Restatement of the Case	1
Respondent's Restatement of the Question Presented	4
Reasons for Denying Writ	4
Federal District Courts are courts of limited jurisdiction	4
Indian title is not a property right sufficient to invoke the jurisdiction of the Federal Court under the "due process" clauses of the Constitution	10
No Federal question exists, for the reason that any rights that the petitioner may ever have had in the lands in question have been extinguished by acts of Congress	9
Any rights that the petitioner may now have have been divested and are exclusively controlled by the Federal Power Act	11
Federal courts have no jurisdiction to determine title and rights in land between citizens of the same state, as the state courts have exclusive jurisdiction in such cases	12
Argument in Answer to Petitioner	13
Conclusion	17

TABLE OF CASES

Coyahoga River Power Co. v. City of Akron, 240 U.S. 462 (1916)	14
Duwamish et al Indians v. United States, 79 Ct. Cls. 530 (Cert. den. 295 U.S. 755)	6, 7
Farson v. City of Chicago, 134 F. 184, p. 186 and 187	13
Iron Mountain, etc. v. City of Memphis, (CCA-6, 1899) 96 Fed. 113	14
Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (203), 24 L. Ed. 656 (658)	5

TABLE OF CASES—(Continued)

	Page
Menominee Tribe of Indians, 95 Ct. Cl. 232	10
Parissi v. General Electric Co., 97 F. Supp. 333 [(4) p. 335]	13
Portland R.R. Co. v. City of Portland, 181 Fed. 632, Appeal dismissed, 218 U.S. 686	14
Shoshone Mining Co. v. Rutter, 177 U.S. 505, 44 L. Ed. 845 (865)	5
Shulthis v. McDougal, 225 U.S. 561, 56 L. Ed. 1205 (1211)	5
Square D Co. v. United Electrical, Radio & Machine Workers of America, 123 Fed. Supp. 776, p. 781(3)	13
Tacoma v. Taxpayers, 43 Wn. (2d) 468, 262 P. (2d) 214	11
Taylor v. Smith, 167 Fed. (2d) 797	5
Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 99 L. Ed. 314	6, 9
United States v. Alcea Band, 329 U.S. 40, 91 L. Ed. 29 (35)	10
United States v. Minnesota, 270 U.S. 181, 70 L. Ed. 539	10
United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (347) 86 L. Ed. 260 (270), 62 S. Ct. 248	8, 16

STATUTES

Federal Power Act, 16 USCA 791 et seq.	2, 11, 15
Indian Claims Act, 60 Stat. 1050 et seq., Public Law No. 726, 79th Congress	2
28 U.S.C. 1331	13
Revised Code of Washington 4.12.010	12

CONSTITUTION

Fifth Amendment to U. S. Constitution	7
Fourteenth Amendment to U. S. Constitution	13, 14, 16

TEXTBOOKS

	Page
27 Am. Jur., Sec. 24, p. 555	6
27 Am. Jur., Sec. 33, p. 561	6
42 Am. Jur., Sec. 31, p. 811	10
42 Am. Jur., Sec. 32, p. 812	10
42 Am. Jur., Sec. 35, p. 814, 815	10
42 Am. Jur., Sec. 70, p. 846	5
54 Am. Jur., Sec. 6, p. 665	4
54 Am. Jur., Sec. 53, p. 707	4
54 Am. Jur., Sec. 140, p. 771	4
54 American Law Reports 10, p. 671	4
1 Barron & Holtzoff, Fed. Practice & Procedure, Sec. 21, p. 39	4

MISCELLANEOUS

Indian Claims Commission, Claim No. 218	15
Federal Rules of Civil Procedure, Rule 12(d)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

COWLITZ TRIBE OF INDIANS, *Petitioner*, vs. THE CITY OF TACOMA, a Municipal Corporation, *Respondent*,	No. 720

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondents pray that petitioner's Petition for Writ of Certiorari be denied for the reason that no Federal question exists in this case to invoke the jurisdiction of the U. S. Supreme Court, as the matter in controversy does not arise under the constitution, laws or treaties of the United States, and the question is political and not justiciable (Pet. App. pp. 13-14).

RESTATEMENT OF THE CASE

For the purpose of clarity, respondent sets forth briefly its statement of the case.

The petitioner, as a tribe, brought suit in the United States District Court to enjoin the construction by the respondent of two dams upon the Cowlitz River in Lewis County, Washington, and to prevent the selling of any bonds in connection therewith, and for monetary damages.

In its Complaint, petitioner sets forth four separate causes of action (R. 3-13. All are based solely upon petitioner's claimed aboriginal or Indian title. No contract or treaty whatever with the United States is alleged or involved. Petitioner's sole contention therein is that it has title to all of the property and rights involved superior to that of the respondent and respondent's predecessors in title, including the original patentees and grantees from the U. S. Government. The action, in essence, was to try title to this property and these property rights in a Federal Court.

The respondent, in its Answer, admits that it is proceeding to build the dams in question under a license issued by the Federal Power Commission, being Project No. 2016, on November 27, 1951, under the Federal Power Act (16 USCA 791 (a) through 823), and has purchased and is purchasing necessary lands and rights in connection therewith from the record title owners thereof (R 13-17).

The respondent in its Answer also sets up three separately stated jurisdictional defenses determinable in a preliminary hearing under Rule 12(d) of the Federal Rules of Civil Procedure (R. 17-18). Briefly these are:

(1) In the absence of congressional recognition of Indian title and specific authorization for the petitioner to sue, the petitioner's only recourse is the prosecution of its claim which it has filed against the government under the Indian Claims Act, 60 Stat. 1050 et seq. Public Law No. 726, 79th Congress (R. 17);

(2) Any rights the petitioner may have had have been extinguished by Congress by the issuance of patents, conveyances and grants (R. 17-18); and

(3) The Complaint does not show on its face that a Federal question is involved. On the contrary, the issues as shown involve solely the title and rights to land located wholly within Lewis County, Washington, and over which the courts of the State of Washington have exclusive and original jurisdiction (R. 18).

As set forth in Exhibit 1 attached to respondent's Answer (R.17 and 84-85), the United States occupied all of the territory in question as sovereign and possessor, has acted as the proprietor or grantor of all lands involved, and has granted and conveyed to respondent's predecessors in title, under acts of Congress, all of the lands and rights involved herein (Pet. App. 14[1]; R. 17).

In a preliminary hearing on these jurisdictional defenses the U. S. District Court, after considering the evidence and files and the affidavits and exhibits in this case, dismissed the action for lack of jurisdiction (R. 95-96). The Court of Appeals for the Ninth Circuit affirmed on the grounds that "the controversy therefore does not arise under the Constitution, Treaties or any law of the United States." (Pet. App. 14).

Petition for Rehearing was denied (Pet. App. 16), and Petition for Writ of Certiorari to this court followed.

---

[1]The Court of Appeals in its opinion in this case stated:

"As a matter of history of which the District Court could take judicial notice, the United States did occupy all this territory, as sovereign and possessor, and has acted as the proprietor or grantor of all the lands involved for a century. The government has granted numerous parcels of these lands to private individuals, school districts and corporations. The City of Tacoma is successor to certain of these grantees. Part of the lands are in forest reserve. The City of Tacoma, as to the water to be impounded, is acting under license from the Federal Power Commission."

RESPONDENT'S RESTATEMENT OF THE QUESTION PRESENTED

The question as stated by petitioner does not accurately and fairly present the question involved. (Pet. 4). The question presented is as follows:

> "Does the Complaint in this action show, on its face, by a statement of legal and logical facts, that this suit is one which really and substantially involves a controversy arising under the Constitution, treaties or laws of the United States upon which this Court can base jurisdiction?"

REASONS FOR DENYING WRIT

FEDERAL DISTRICT COURTS ARE COURTS OF LIMITED JURISDICTION

It is universally conceded that the Federal District Courts are courts of limited jurisdiction, and their powers and duties depend solely upon the acts which call them into existence or subsequent acts which extend or limit their jurisdiction. 54 Am. Jur., Sec. 6, p. 665; 54 ALR Sec. 10, p. 671; 1 Barron & Holtzoff, Fed. Practice & Procedure, Sec. 21, p. 39.

The Complaint must show, by a statement of facts in legal and logical form, that the suit is one which really and substantially involves a controversy based on the construction of or application of the Constitution or some law or treaty of the United States, and the allegations of the Complaint cannot be helped out by resort to the other pleadings or by judicial notice. 54 Am. Jur. Sec. 53, p. 707 and Sec. 140 p. 771.

When the controversy is over rights in real property, such as here, the fact that titles involved may have emanated from the Federal Government or the con-

troversy involves construction of Federal statutes, does not vest the Federal District Court with jurisdiction in the matter.[2]

These principles of law are also enunciated in the decisions of the United States Supreme Court.

In *Shulthis vs. McDougal*, 225 U.S. 561, 56 L. Ed. 1205, the Court on page 1211 states:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws. * * *" [3]

Under the principles of law above set forth, it is obvious the Complaint in this action is fatally defective in that it fails to state facts sufficient to show that a real and substantial Federal question is involved upon which jurisdiction can be based.

---

[2] In 42 Am Jur., Sec 70, p. 846, it is stated:

> "It is the rule that the courts of a state must determine the validity of titles to land lying in the state, although such titles emanated from the Federal Government or the controversy involves construction of Federal statutes, and they can determine between individuals the priority or validity of conflicting titles under different grants from the same antecedent source. * * *"

[3] In accord see *Taylor vs. Smith*, 167 Fed. (2d) 797; *Shoshone Mining Co. vs. Rutter*, 177 U. S. 505, 44 L. Ed. 845 (865);

Little York Gold-Washing & Water Co. vs. Keyes, 96 U. S 199 (203) 24 L. Ed. 656 (658)

INDIAN TITLE IS NOT A PROPERTY RIGHT SUFFICIENT TO INVOKE THE JURISDICTION OF THE FEDERAL COURT UNDER THE "DUE PROCESS" CLAUSES OF THE CONSTITUTION

The claims of the petitioner are based solely upon its claimed aboriginal or Indian title (Pet. App. 9). Such rights are not those rights coming under the protection of the "due process" clauses of the Constitution. Aboriginal or Indian title is a mere right of occupancy and is not a vested property right (27 Am. Jur., Sec. 24, p. 555), and the extinguishment of Indian title is entirely a question of governmental policy and is not open to contestation in judicial tribunals (27 Am. Jur., Sec. 33, p. 561). (Pet. App. 13)

The Federal Courts have in many cases decided and discussed various issues involving property rights of Indians. Two of these cases have exhaustively analyzed and defined aboriginal or Indian title and have reconciled and interpreted many, if not the great majority, of the important cases dealing with these rights. These cases are:

(1) *Duwamish et al Indians vs. United States*, 79 Ct. Cls. 530 (Cert. denied, 295 US 755), which was decided June 4, 1934; and

(2) *Tee-Hit-Ton Indians vs. United States*, 348 US 272, 99 L. Ed. 314, which was decided February 7, 1955, on a Writ of Certiorari to review a judgment of the United States Court of Claims (128 Ct. Cls. 82; 120 F. Supp. 202).

In the *Duwamish case, supra*, action was brought in the United States Court of Claims under the authority of 43 Stat. 886, Chapter 214, by nineteen Indian tribes as plaintiffs five of whom were nontreaty Indians, as

here. Plaintiff tribes sought to recover damages for the alleged value of land thrown open to public settlement by Congress. The Court, speaking on the necessity of governmental recognition of Indian title in order to base any rights theron sufficient to give the courts jurisdiction, stated on pages 602 and 603 as follows:

> "We are of the opinion that this court is without jurisdiction in a case between tribal Indians and the United States for the recovery of the alleged value of lands thrown open to public settlement by an act of Congress, in the absence of a treaty or an act of Congress recognizing the Indians' title by right of occupancy to the same. The special jurisdictional acts do not confer such jurisdiction (*Mille Lac Indian case, supra*), and the issue is a political and not a judicial one."[*]

The *Tee-Hit-Ton case, supra*, is a recent case wherein this Court again reiterated the principles laid down in the *Duwamish case, supra*, and held that the manner, method and time of the extinguishment of Indian title raise political and not justiciable issues, and the Federal courts have no jurisdiction in the matter.

This action was brought by the plaintiff under the Fifth Amendment to recover compensation for the taking of timber from private lands, the plaintiff, as here, basing its claims on aboriginal or Indian title.

[*]The Court, in the Duwamish case, at pages 598-600, stated:

> "* * * Tribal Indians claimed by right of occupancy such vast and unlimited areas of lands, encompassing in many instances the greater and better portions of what are now States of the Union, that had it ever been the political policy of the Government to accord them the same proprietary right that attaches to a title superior to that of occupancy, and open the courts to suits as and for their taking when thrown open to public settlement by the United States, Congress and the courts would have left open no doubts upon the subject."

The United States Court of Claims denied compensation to the plaintiff Indians, and this Court affirmed the judgment of the Court of Claims. This Court, in summing up the relationship between the United States and the Indians in respect to their rights in lands, stated on page 326 (L. Ed.) as follows:

> "In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle."[5]

[5]The Court stated on page 320 "Indian Title" is defined as follows:

> "*Indian Title.* * * * That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. *This is not a property right* but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians. (Italics ours.)

On page 321, in recognizing the supreme power of Congress over such lands, the Court stated as follows:

> "In 1941 a unanimous Court wrote, concerning Indian title, the following.
>
> "'*Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable issues.*' *United States v. Sante Fe Pacific R. Co.*, 314 US 339, 347, 86 L. Ed. 260, 270, 62 S Ct 248." (Italics ours.)

Other United States agencies are in accord. In Footnote 21, p. 325

There can be no argument that under the principles laid down in the above cases, Indian title is not such a property right, having never been recognized in the petitioner by Congress sufficient to vest jurisdiction in the Federal courts in this instance; and on this basis alone the Petition for Writ of Certiorari by the petitioner should be denied.

NO FEDERAL QUESTION EXISTS, FOR THE REASON THAT ANY RIGHTS THAT THE PETITIONER MAY EVER HAVE HAD IN THE LANDS IN QUESTION HAVE BEEN EXTINGUISHED BY ACTS OF CONGRESS

The United States had paramount title to all lands and rights claimed by the petitioner, and has conveyed that title and those rights to third parties by the issu-

---

of this case, in defining Indian or aboriginal title by several government agencies, it is stated:

"The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee Print No. 12, Supplemental Reports dated January 11, 1954, on HR 1921, 83d Cong.—Sess.

"*Department of Interior*: 'That the Indian right of occupancy is not a property right in the accepted legal sense was clearly indicated when United States v. Alcea Band of Tillamooks, 341 US 48, 95 L. Ed. 738, 71 S Ct 552 (1951) was reargued. The Supreme Court stated, in a per curiam decision, that the taking of lands to which Indians had a right of occupancy *was not a taking within the meaning of the fifth amendment* entitling the dispossessed to just compensation. (Italics ours.)

"'Since possessory rights based solely upon aboriginal occupancy or use are thus of an unusual nature, subject to the whim of the sovereign owner of the land who can give good title to third parties by extinguishing such rights, *they cannot be regarded as clouds upon title in the ordinary sense of the word.* * * *'" (Italics ours.)

"*Department of Agriculture*: 'We also concur in the belief which we understand is being expressed by the Department of the Interior that no rights presently exist on the basis of aboriginal occupancy or title. * * *'

"*Department of Justice*: 'Thus, there is no legal or equitable basis for claims or rights allegedly arising from "aboriginal occupancy or title."'"

ance of patents or grants or conveyances. Thus all rights that the petitioner may have ever had in said lands have been extinguished by the United States, no Federal question exists, and petitioner's remedy is in the United States Court of Claims, where it now has pending its claim for damages for the taking of such lands by the United States Government (R 17-19, 84-86).

The United States, by the issuance of these patents and grants, not only has extinguished all rights that the petitioner may have had in such lands, but also has divested itself of all title and rights in the land conveyed. 42 Am. Jur., Sec. 31, p. 811, and Sec. 32, p. 812.

This Court, in *United States vs. Alcea Band*, 329 US 40, 91 L. Ed. 29, on page 35 (L. Ed.) clearly and concisely sets forth this principle as follows:

> "As against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. *Termination of the right by sovereign action was complete and left the land free and clear of Indian claims.* Third parties could not question the justness or fairness of the methods used to extinguish the right of occupancy. Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title * * *" (Italics ours.)"

"See also in accord 42 Am. Jur., Sec. 35, p. 814 and 815, and *U. S. vs. Minnesota*, 270 U. S. 181, 70 L. Ed. 539, and *Menominee Tribe of Indians case*, 95 Ct. Cl. 232, where the effect of the issuance of a patent by the United States Government is ably discussed.

Respondent submits that any rights the petitioner may have had in any lands here in question have been extinguished by the issuance of the patents and grants set forth in respondent's Second Defense in its Answer (R. 17-18), and therefore the petitioner has no property rights under any constitutional provisions upon which the District Court could base jurisdiction.

ANY RIGHTS THAT THE PETITIONER MAY NOW HAVE HAVE BEEN DIVESTED AND ARE EXCLUSIVELY CONTROLLED BY THE FEDERAL POWER ACT

Not only have all rights that the petitioner may have ever had been extinguished by Congressional acts, but also any remaining rights which petitioner may conceivably claim at the present time in these lands involved are wholly and completely subject to disposition by the Federal Government under the Federal Power Act, 16 USCA, Sec. 791 to 825r. Section 818 thereof specifically provides that from the date of the filing of the application for license, all lands owned by the Government and included in any proposed project shall be withdrawn from other disposal. It is obvious, therefore, that petitioner's claims, if any, are subject to the exclusive disposal and extinguished thereof by the Federal Government under the terms of the Federal Power Act.

This power has been recognized by the Supreme Court of the State of Washington in *Tacoma vs. Taxpayers*, 43 Wn. (2d) 468, 262 P. (2d) 214.[7]

[7]The Supreme Court of Washington, on page 481 of its opinion, states:

"* * * The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense

FEDERAL COURTS HAVE NO JURISDICTION TO DETERMINE TITLE AND RIGHTS IN LAND BETWEEN CITIZENS OF THE SAME STATE, AS THE STATE COURTS HAVE EXCLUSIVE JURISDICTION IN SUCH CASES

The United States District Court has no jurisdiction to try the title to lands and rights in lands as between the petitioner and respondent.

Both parties to this action are citizens of the State of Washington. This action involves simply and solely questions as to the title and rights in lands all located in Lewis County, Washington (R. 84-86). The petitioner is in no better position than any other citizen of the State of Washington, and must bring its action involving these lands against the respondent in Lewis County, in accordance with RCW 4.12.010.*

The Federal courts at all times are vigilant so as not

*RCW 4.12.010 provides as follows:

"Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:

"(1) For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title, or for any injuries to real property. * * *"

---

private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion."

Again on page 498 it is stated:

"* * * On the authority of those decisions, we must hold that Congress had the constitutional power to enact the Federal power act and that, in doing so, it intended to exercise its full jurisdiction to authorize the power commission to supersede state laws purporting to prohibit or limit the construction of dams on navigable streams. By passing the act, Congress pre-empted the entire field and authorized the power commission to issue licenses for such construction upon such conditions as it deemed proper."

to infringe upon the State courts' jurisdiction and rights.

In *Square D Co. vs. United Electrical, Radio & Machine Workers of America*, 123 Fed. Supp. 776, the Court states on page 781(3) as follows:

> "Preservation of our federal system required the federal courts to give due regard to the rightful independence of state governments by scrupulously confining their own jurisdiction to precise limits defined by statute. *Healy v. Ratta*, 292 U.S. 263, 270, 54 S. Ct. 700, 78 L. Ed. 1248; *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 67, 62 S. Ct. 15, 86 L. Ed. 47; *Cf. Silverton v. Rich*, D.C. Cal. 1954, 119 F. Supp. 434."

In accord see also *Parissi v. General Electric Co.*, 97 F. Supp. 333 ([4] page 335); and *Farson v. City of Chicago*, 134 F. 184, (pages 186 and 187).

ARGUMENT IN ANSWER TO PETITIONER

Petitioner bases jurisdiction of this court upon the provision of 28 U.S.C. 1331 (Pet. 4). Obviously, therefore, the sole question for the consideration of the Court is whether the matters here in controversy arise under the Constitution, laws or treaties of the United States.

It is admitted that no treaties are involved (Pet. 5).

Petitioner, in its statement of "the question presented," limits the consideration of the Court to the precise question of whether or not the matters here in controversy arise under the Fourteenth Amendment to the Constitution of the United States (Pet. 4-5).

The petitioner makes the naked assertion that because private vested property rights are protected under the "due process clauses" of the Constitution, the determination of the rights as claimed in petitioner's Complaint, under aboriginal or Indian title, also involve a controversy arising under the Constitution of the United States and of which the Federal courts have jurisdiction (Pet. 5-6).

In support of this, petitioner cites three cases.[9]

All three of these cases involved properties and rights universally recognized as vested property over which there could be no question as to the jurisdiction of the Federal courts. These cases have no bearing whatsoever upon the jurisdictional question involved here.

The fallacy of the entire argument of the petitioner is that it assumes as true that which is in dispute; that is, that its rights under Indian title as alleged in its Complaint are vested property rights and therefore within the protection of the Fourteenth Amendment to the Constitution. The undisputed facts are that petitioner's rights under Indian title, have never been recognized by any treaty or any acts of Congress, and none exist. Furthermore, any rights that the petitioner may ever have had were extinguished long ago by the issuance of patents and grants authorized by acts of Congress (R. 17-18, Exhibit 1; 84-86) (Pet. App. 14).

[9] *Portland R.R. Co. v. City of Portland*, 181 Fed. 632, Appeal dismissed, 218 U.S. 686 (Bean, D.J., 1910 CC Ore.); *Iron Mountain, etc., v. City of Memphis* (CCA-6, 1899) at 96 Fed. 113; *Coyahoga River Power Co. v. City of Akron*, 240 U.S. 462 (1916).

In its petition before the Indian Claims Commission of the United States (No. 218), which was verified under oath and which is still pending and which covers all of the properties and rights herein involved, the petitioner admits that it had been deprived of all of its lands and rights therein by the United States.[10]

Furthermore, any rights that petitioner may conceivably have at the present time in any of these lands involved are wholly and completely subject to disposition by the Federal Government and under its control by the provisions of the Federal Power Act, 16 USCA, Sec. 791-825r (Sec. 818).

[10]Paragraph IV of the Petition states in part;

"* * * No further effort was made by the United States after said council meeting terminated March 2, '855, to treat with said tribe, but the United States continued to encourage the settlement of the lands of said tribe by American settlers, made numerous grants of land to such settlers out of the lands of said tribe and forcibly removed the Cowlitz Indians from their lands, all without compensation to said tribe and its members."

In Paragraph VI the Petition further alleges:

"Much of the timber on the lands of the Cowlitz Tribe of Indians has been cut and removed by the United States and its citizens and by the State of Washington and its citizens and millions of dollars have been received therefrom. The fur-bearing and big game animals which abounded in the area have been killed and destroyed by the white hunter. The Cowlitz River and other streams referred to in paragraph III have been depleted of their fish by the commercial and sport fishing of the white man. The kammas grounds have been despoiled. All of the foregoing acts deprived said tribe of their lands and their value and also of the right to take from the forests, streams and the land those things necessary to their living, and reduced said tribe and its members to a condition of extreme poverty and want. That no payment has ever been made by the United States to said tribe for the taking of its lands, nor for depriving said tribe and its members of the right to occupy the same and of the right to hunt and fish in the accustomed way and in the customary places and to gather food and berries, all of which are of great value. *That the doing of the foregoing acts by the United States, all of which were done against the will of said tribe* and without payment of compensation to said tribe, was and is unconscionable." (Italics ours.)

Petitioner cites *U. S. Santa Fe Railway Co.*, 314 U.S. 339 (Pet. 9) as authority upon which this Court must take jurisdiction of this case. The obvious distinction between that case and this is well stated in the opinion of the Circuit Court of Appeals for the Ninth Circuit, as follows:

> "* * * There is on the face of the pleading no Federal question. The United States is not a party, as it was in the Santa Fe case. Here the Tribe does not allege that the United States has ever recognized any title in these Indians, either collectively or individually, by congressional action or by executive order. The primary question in a condemnation action is compensation for the title. The Cowlitz did not enter into any treaty with the government, so the construction of no such instrument is involved." (Pet. App. 14).

It is apparent, therefore, that the petitioner, under its Indian title as alleged, has no property rights involved herein coming under the protection of the Fourteenth Amendment to the Constitution. The issues involved herein are political and not judicial and the Court has no jurisdiction.

Respondent respectfully submits that the petitioner, has no vested property rights within the protection of the "due process clauses" of the Constitution upon which any Federal court can base jurisdiction. The petitioner's exclusive remedy is before the Indian Claims Commission, where it now has pending its claim against the U. S. Government for the extinguishment of such rights as alleged therein.

CONCLUSION

The decisions of the lower courts were correct, and the petitioner's Petition for Writ of Certiorari should be denied on the grounds of lack of jurisdiction for the following reasons:

1. There is no Congressional recognition of any title or rights whatsoever in the petitioner to any of the lands or rights involved.

2. The issues raised herein are political and not judicial.

3. The allegations of the Complaint do not show that this action is one within the jurisdiction of the Federal courts. The naked assertion that a Federal question is involved is not sufficient.

4. Any rights the petitioner may have ever had in the past were extinguished years ago by the issuance of patents and grants authorized by acts of Congress, (R. 22, 84-86). Any remaining land or rights in this project were extinguished and terminated by the granting of a license to the respondent to build these dams under the authority of the Federal Power Act, supra.

5. The Congress of the United States has specifically granted to the petitioner and all other Indian tribes an exclusive remedy before the Indian Claims Commission, which course the petitioner is now pursuing (R. Exhibits 2 and 3 attached to respondent's Answer, p. 17).

6. The State courts have exclusive and original jurisdiction over controversies between its citizens involving title and rights to land within said state.

Respectfully submitted,

MARSHALL MCCORMICK
ROBERT R. HAMILTON
PAUL J. NOLAN
Attorneys for Respondent

304 City Hall
Tacoma 2, Washington